Tey Moon Kim v Hon Siew Mei

HIGH COURT (JOHOR BAHRU) — NO 23NCVC-165 OF 2011
VERNON ONG J
17 MAY 2012

Civil Procedure — Pleadings — Specific performance — Departure from pleaded case — Issue of fact — Obligation to plead all facts intended to be relied upon — Whether evidence of facts not pleaded can be given at trial

Contract — Breach — Sale of property — Specific performance — Preparation of document signified to be receipt — Receipt written in English and Chinese — Whether heading or receipt ambiguous — Receipt and cheque received and kept but did not proceed with sale of property — Whether receipt was option letter followed by formal sale and purchase agreement — Whether receipt inadmissible — Burden of proof

The defendant, a Singaporean residing in Singapore, was the registered owner of a double storey semi-detached house. She had appointed one Madam Kow Fuk Chan ('KFC') as her exclusive agent to sell the property for RM1m or more and subsequently, the latter approached one Mr Lim Guat Beng ('Lim') and informed him that the property was for sale for RM1m. Lim later informed KFC that he had a purchaser who was interested in purchasing the property. Lim then prepared-a single-page document bearing heading 'SALES & PURCHASE OF HOUSING AGREEMENT & TEMPORARY RECEIPT' ('the receipt') and handed it over to KFC together with a cheque for RM10,000 drawn in favor of the defendant. KFC then visited the defendant and informed her that a businessman wanted to buy the property. The receipt and cheque were produced and handed over to the defendant. The defendant signed the receipt and kept the cheque but did not proceed with the sale of the property. Pursuant to the execution of the receipt, the defendant agreed to sell the property to the plaintiff for RM1m. The defendant requested the plaintiff to pay the deposit of RM10,000 to Lim, the defendant's agent and the deposit was paid. The plaintiff's solicitors forwarded a draft sale and purchase agreement to Messrs Sing, Lim & Low ('MSLL'), a legal firm, for approval. The defendant did not respond to the plaintiff's solicitors. MSLL then wrote to the plaintiff informing that the defendant had not accepted the earnest deposit sum of RM10,000 and demanded that the plaintiff remove her private caveat on the property. Consequently, the plaintiff claimed for specific performance, alternatively, damages for breach of contract, interest and costs. The issues

before the court were whether the receipt was inadmissible; whether the plaintiff was entitled to depart from the pleaded case and the burden of proof.

Held, dismissing the claim with costs:

(1) The receipt was a document written out in the English language and in Chinese language. The court was able to comprehend the nature of the document from the contents in the English language. Notwithstanding its somewhat ambiguous heading, the receipt was essentially an option document which was commonly employed for sale and purchase of landed properties. This finding was consistent with the evidence of Lim and the defendant where both knew and understood that the receipt was an option letter which would be followed by the execution of a formal sale and purchase agreement (see para 15).

(2) The plaintiff was obliged to plead all facts which she intended to rely on, otherwise she could not strictly give any evidence of them at the trial. On the one hand, it was pleaded that Lim was the defendant's agent and that Lim received the deposit and paid it over to the defendant. On the other hand, Lim testified that he was the plaintiff's agent. This contradicted the pleaded case. The issue of whether Lim or KFC was the agent of the plaintiff or the defendant was relevant issue of fact (see para 22).

(3) The plaintiff must establish its case. Failure to do so, it would not do for the plaintiff to say that the defendant had not established its defence. Lim's evidence had been discounted. Consequently, there was essentially no other evidence to support the plaintiff's case. The plaintiff failed to make out a prima facie case. The plaintiff had clearly failed to satisfy the original burden of introducing evidence to prove her case on the balance of probabilities. It was not necessary for the court to consider the question of whether the defendant had established her defence (see paras 23–24).

[Bahasa Malaysia summary

Defendan, seorang warganegara Singapura yang menetap di Singapura, merupakan pemilik berdaftar rumah kembar dua tingkat. Dia telah melantik Puan Kow Fuk Chan ('KFC') sebagai ejen eksklusifnya untuk menjual hartanah tersebut berjumlah RM1 juta atau lebih dan berikutan itu, ejen tersebut telah berjumpa dengan Encik Lim Guat Beng ('Lim') dan memberitahunya bahawa hartanah tersebut adalah untuk dijual dengan harga RM1 juta. Lim kemudian telah memberitahu KFC bahawa dia telah menemui pembeli yang berminat untuk membeli hartanah tersebut. Lim kemudian telah menyediakan sekeping dokumen bertajuk 'SALES & PURCHASE OF HOUSING AGREEMENT & TEMPORARY RECEIPT' ('resit tersebut') dan menyerahkannya kepada KFC bersama cek berjumlah RM10,000 yang dikeluarkan bagi pihak defendan. KFC kemudian telah berjumpa dengan

defendan dan memberitahunya bahawa seorang peniaga ingin membeli hartanah tersebut. Resit tersebut dan cek tersebut telah dikemukakan dan diserahkan kepada defendan. Defendan telah menandatangani resit tersebut dan menyimpan cek tersebut tetapi tidak meneruskan jualan hartanah tersebut. Berikutan penyerahan resit tersebut, defendan telah bersetuju untuk menjual hartanah tersebut kepada plaintif untuk RM1 juta. Defendan meminta plaintif membayar deposit RM10,000 kepada Lim, ejen defendan dan deposit tersebut telah dibayar. Peguamcara plaintif telah mengemukakan draf perjanjian jual beli kepada Tetuan Sing, Lim & Low ('TSLL'), sebuah firma guaman, untuk kelulusan. Defendan tidak memberi maklum balas kepada peguamcara plaintif. TSLL kemudian telah menulis kepada plaintif memberitahu bahawa defendan tidak menerima deposit berjumlah RM10,000 itu dan menuntut agar plaintif membatalkan kaveat persendirian ke atas hartanah tersebut. Berikutan itu, plaintif telah menuntut pelaksanaan spesifik, dan secara alternatif, ganti rugi kerana pelanggaran kontrak, faedah dan kos. Isu-isu di hadapan mahkamah adalah sama ada resit tersebut tidak boleh diterimapakai; sama ada plaintif berhak mengelak daripada kes yang dipli dan beban pembuktian.

Diputuskan, menolak tuntutan dengan kos:

(1) Resit tersebut merupakan dokumen yang ditulis dalam bahasa Inggeris dan bahawa Cina. Mahkamah memahami sifat dokumen tersebut berdasarkan kandungan dalam bahasa Inggeris tersebut. Walaupun tajuknya tidak jelas, resit tersebut adalah dokumen pilihan penting yang biasa digunakan untuk jual beli hartanah atas tanah. Penemuan ini adalah konsisten dengan keterangan Lim dan defendan yang mana kedua-duanya mengetahui dan memahami bahawa resit tersebut merupakan surat pilihan yang akan disusuli dengan pelaksanaan perjanjian jual beli yang formal (lihat perenggan 15).

(2) Plaintif mempunyai tanggungjawab untuk mempli semua fakta yang ingin digunakan olehnya, jika tidak dia tidak dapat memberi apa-apa keterangan terhadap fakta tersebut semasa perbicaraan. Begitupun, adalah diplikan bahawa Lim adalah ejen defendan dan Lim telah menerima deposit tersebut dan membayarnya kepada defendan. Sebaliknya, Lim telah memberi keterangan bahawa dia merupakan ejen plaintif. Ini bercanggah dengan kes yang diplikan. Isu sama ada Lim atau KFC merupakan ejen plaintif atau defendan adalah isu fakta yang relevan (lihat perenggan 22).

(3) Plaintif hendaklah membuktikan kesnya. Kegagalan berbuat demikian, plaintif tidak boleh menyatakan defendan tidak dapat membuktikan pembelaannya. Keterangan Lim telah dikurangkan. Berikutan itu, tiada keterangan lain untuk menyokong kes plaintif. Plaintif telah gagal membuktikan kes prima facie. Plaintif jelas telah gagal memenuhi beban

A asal mengemukakan keterangan untuk membuktikan kesnya atas imbangan kebarangkalian. Adalah tidak perlu untuk mahkamah mempertimbangkan persoalan sama ada defendan telah membuktikan pembelaannya (lihat perenggan 23–24).]

B **Notes**

For a case on specific performance, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 6574.

For cases on sale of property, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3175–3177.

C **Cases referred to**

Abrath v The North Eastern Railway Company (1883) 11 QBD 79 (refd)

Bruce v Odhams Press Ltd [1936] 1 KB 697 (refd)

D *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176, HC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (refd)

E *Selvaduray v Chinniah* [1939] 1 MLJ 253 (refd)

Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)

Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420, SC (distd)

F *UDA Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd)* [2009] 2 MLJ 408, HC (refd)

Wrightson v Cooke, Re [1908] 1 Ch 789, Ch D (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

G **Legislation referred to**

Evidence Act 1950 ss 101(1), 102

Rules of the High Court 1980 O 14, O 18 rr 7, 11, O 92 r 1

H *L Parthiban (Shobana Mala a/p Krishnan with him) (L Parthiban, Zulkiflee, Syed Sadik) for the plaintiff.*

PR Chua (Chua & Partners) for the defendant.

Vernon Ong J:

I

[1] The plaintiff's claim against the defendant is for specific performance of an agreement for the sale of a double storey semi-detached house or alternatively for damages for breach of contract.

BRIEF ACCOUNT OF THE FACTS

[2] The defendant is a Singaporean citizen residing in Singapore. She is the registered owner of a double storey semi-detached house known as No 107, Jalan Dato Sulaiman, Taman Abad, 80250 Johor Bahru ('the property'). On or about 7 February 2011, she appointed one Madam Kow Fuk Chan ('KFC') as her exclusive agent to sell the property for RM1m or more.

[3] KFC subsequently approached one Mr Lim Guat Beng ('Lim') and informed him that the property was for sale for RM1m. Lim later informed KFC that he had a purchaser who was interested to buy the property. Lim then prepared a single page document bearing heading 'SALES & PURCHASE OF HOUSING AGREEMENT & TEMPORARY RECEIPT' ('the receipt') which was handed over to KFC together with a cheque for RM10,000 drawn in favour of the defendant.

[4] On 9 February 2011, KFC visited the defendant and informed her that a businessman wanted to buy the property. KFC produced the receipt and handed over the cheque to the defendant. The defendant signed the receipt and kept the cheque. The sale and purchase of the property did not proceed.

The plaintiff's case

[5] Pursuant to the execution of the receipt, the defendant agreed to sell the property to the plaintiff for RM1m. The defendant requested the plaintiff to pay the deposit of RM10,000 to Lim the defendant's agent. The deposit was paid to Lim on 9 February 2011 and paid to the defendant. On 14 February 2011, the defendant sent copies of her identity card, document of title to the property and quit rent receipt to the plaintiff's solicitors for the preparation of the sale and purchase agreement.

[6] On 14 February 2011, the plaintiff's solicitors forwarded a draft sale and purchase agreement to Messrs Sing, Lim & Low ('MSLL'), a firm of advocates and solicitors for approval. On 25 February 2011, the plaintiff's solicitors forwarded a bankers cheque for RM90,000 being the balance 10% of the purchase price to MSLL. However, on even date MSLL replied stating that they have no authority to act for the defendant in respect of the sale and purchase agreement. On 28 February 2011, the plaintiff's solicitors wrote to the defendant asking for the particulars of her solicitors. The defendant did not respond to the plaintiff's solicitors. On MSLL wrote to the plaintiff informing that the defendant had not accepted the earnest deposit sum of RM10,000 and demanded that the plaintiff remove her private caveat on the property.

[7] By reason of the aforesaid, the defendant has breached the agreement. Consequently, the plaintiff is claiming for specific performance, in the alternative damages for breach of contract, interest and costs.

The defendant's defence

[8] The defence as pleaded is mounted on the following planks:

(a) her signature on the receipt was procured through fraud and negligent misrepresentation of KFC;

(b) there was no concluded contract for the sale of the property to the plaintiff;

(c) the defendant never agreed to sell the property to the plaintiff for RM1m;

(d) the cheque for the earnest deposit of RM10,000 could not be used in Singapore because it was not valid. The cheque was given by Lim and should be returned to Lim; and

(e) the defendant never appointed any solicitors to act for the sale and purchase agreement.

Overview of the evidence

[9] Lim was called to give evidence for the plaintiff's case. The defendant gave evidence in her own defence.

[10] Lim said that he was approached by KFC some time in February 2011. KFC informed him that the property was for sale for RM1m. Later, Lim informed KFC that he had an interested party where wanted to buy the property. Lim produced the receipt (marked as ID1) which was prepared by him. Lim said that he signed on the receipt as the purchaser's agent. Lim then handed over the receipt together with a cheque for the deposit of RM10,00 to KFC on 9 February 2011. KFC left with the receipt and cheque to see the defendant in Singapore. The following day, KFC returned and handed over the Lim the receipt together with copies of the defendant's identity card and title deed to the property; this was so that the purchaser could proceed to prepare the sale and purchase agreement. Subsequently, the defendant contacted Lim and asked that the purchase price be increased to RM1.1m. Lim informed the plaintiff but the plaintiff was not agreeable.

[11] The defendant testified that on 7 February 2011 she appointed KFC as her exclusive agent for three months to sell the property for not less than RM1m. On 9 February 2011, KFC met her in Singapore. KFC showed her the

receipt and a cheque. The defendant said that she was pressured by KFC into signing the receipt; after which KFC handed over the cheque to her. KFC left with the receipt which had been signed by the defendant. After being told by her brother that the market value of the property was between RM1.3 to 1.4 million the defendant called KFC to complain about the low price. Later KFC called the defendant saying that the property could fetch RM1.2m. Lim then contacted the defendant and told her that a similar property which was renovated could fetch RM1.2m, but the property was not renovated. The defendant denied appointing MSLL as her solicitors for the transaction.

FINDINGS OF THE COURT

[12] Before proceeding to evaluate the evidence aforesaid, the court will address some preliminary issues. Learned counsel for the defendant raised two objections. Firstly, he objected to the receipt on the ground that it is a document in a foreign language which was not translated (*Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 (SC); O 92 r 1 of the RHC 1980). Secondly, learned counsel for the defendant objected to the admissibility of Q&A 3 and 4 of Lim's witness statement (marked as 'PWS1') on the ground that the evidence is a total departure from the pleadings in the statement of claim (*Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 (SC)). The parties are bound by the pleadings. If there was a need to amend the pleadings, the plaintiff ought to have applied for such amendment to the statement of claim. It is not the function of the court to correct the pleadings or the pleaded case of the parties. The plaintiff is not entitled in law to depart from the pleaded case (*CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176).

Whether the receipt is admissible?

[13] Learned counsel for the plaintiff submitted that the facts in *Sykt Telekom* case can be distinguished with the present case. In *Sykt Telekom* case, the Chinese business directory which was produced was completely in Mandarin; as such it was necessary to be translated in the national language. In the present case, the receipt is a document in English and Chinese; whereby the contents in English have been translated into Mandarin. Therefore, the receipt complies with O 92 r 1 as it is in the English language and need not be translated.

[14] Order 92 r 1 of the RHC is a mandatory provision. It requires any document not in the national language or in the English language to be translated into the national language before it can be admitted into evidence. In *Sykt Telekom* case, the book in question was in Chinese writing. The witnesses told the court that it contains a list of businesses and trade names together with

A the telephone numbers. The Supreme Court held that it is the primary; function and duty of a trial judge to look at the book, to satisfy himself as to what is it, and decide, if necessary, with the help of the experts in the Chinese language and writing, whether the book is in fact a telephone directory as defined by the law. The trial judge cannot rely on the oral evidence of witnesses B alone as to what the contents of the book are. It is impossible for the trial judge, by looking at the book, to come to any decision simply because he himself is unable to understand what it is.

C **[15]** In this case, the receipt is a document written out in the English language and in Chinese language. Perusing the receipt, the court is able to comprehend the nature of the document from the contents in the English language. Notwithstanding its somewhat ambiguous heading of 'SALES & PURCHASE OF HOUSING & TEMPORARY RECEIPT', the receipt is essentially an option document which is commonly employed for sale and D purchase of landed properties. This finding is consistent with the evidence of Lim and the defendant where both knew and understood that the receipt was an option letter which would be followed by the execution of a formal sale and purchase agreement. The court also agrees with learned counsel for the plaintiff that Sykt Telekom's case is distinguishable on the facts as the document was E entirely in Chinese and the trial judge was unable to make out nature of the document. In the premises, the receipt is admitted into evidence and marked as exh P1.

Whether the plaintiff is entitled to depart from the pleaded case?

F

[16] Learned counsel for the defendant contended that evidence in Q&A 3 and 4 are a total departure from paras 4–5 of the amended statement of claim where it is pleaded that Lim was the defendant's agent and that the RM10,000 G deposit was given the Lim as agent for the defendant. In Q&A 3, Lim said that the defendant through her agent KFC agreed to accept the RM10,000 deposit from the plaintiff. In Q&A 4, Lim said that he signed the receipt at the column named purchaser as the purchaser's agent.

Fundamental principle of pleadings

H

[17] Before the court is called upon to answer any matter in dispute, it is in all cases desirable, and in most cases necessary, that the issue to be submitted for adjudication must be clearly identified. The defendant is entitled to know what I it is that the plaintiff alleges against him; the plaintiff is in turn entitled to know what defence will be raised in answer to his claim. In this regard the pleadings (the statement of claim and the statement of defence) must comply with four fundamental requirements:

(a) every pleading must state facts (though points of law may also be raised);

(b) it must state material facts only;

(c) it must state facts and not the evidence by which they are to be proved; and

(d) it must state such facts concisely in a summary form.

(Order 18 rr 7 and 11 of the RHC 1980; *Odgers' Principles of Pleadings and Practice*, (12th Ed), p 84).

[18] In this respect, material facts are facts that are 'necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad' (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at p 712).

[19] As a corollary, every party must therefore state his whole case. He must plead all facts which he intends to rely on, otherwise he cannot strictly give any evidence of them at the trial. 'The plaintiff is not entitled to relief except in regard to that which is alleged in the pleadings and proved at the trial' (per Warrington J in *Re Wrightson v Cooke* [1908] 1 Ch 789, at p 799). Therefore, a party is therefore bound by his pleadings in the sense that his whole case is confined to the issues raised in the pleadings. This court is similarly bound by the pleadings. It follows that if a fact is not pleaded, then no evidence of it can be produced (see also *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC)). Even if such evidence is produced, it cannot be considered for being in violation of this fundamental principle. In this connection it is also instructive to consider the following words of Abdul Malik Ishak J (now JCA) in *UDA Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd)* [2009] 2 MLJ 408 at p 454:

> The parties are certainly bound by their pleadings. It is a well settled principle of law that in the absence of pleadings, evidence if produced by the parties cannot be considered and no party shall be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of his case before the court (*Ram Sarup Gupta (dead) by LRs, v Bishun Narain Inter College & Ors* AIR 1987 SC 1242 and *K Kanakarathnam v A Perumal & Anor* AIR 1994 Mad 247). No evidence can be led on a fact that is not pleaded (*Hah Chand v Daulat Ram* AIR 1987 SC 94). Put differently, it is not open to the parties to give up the case set out in the pleadings and propound a completely new and different case (*Vinod Kumar v Smt Surjit Kaur* AIR 1987 (Vol 74) SC 2179 at p 2183).

[20] In this instance, it is pleaded in the amended statement of claim that (i) Lim is the agent for the defendant; (ii) that Lim received the deposit as the defendant's agent; and (iii) Lim as the defendant's agent paid the deposit to the

defendant. At the trial, however, Lim testified that KFC was the defendant's agent and that KFC received the deposit as the defendant's agent and that KFC paid the deposit to the defendant.

[21] In reply, learned counsel for the plaintiff denied that there is any difference in Lim's evidence from the amended statement of claim. Instead, he submitted that there was an oversight and only a typographical error in paras 4–5 of the amended statement of claim. There was no prejudice to the defendant. Instead of 'agen yang telah dilantik dan diberikuasa oleh plaintif' it had been typed as 'agen yang telah dilantik dan diberikuasa oleh defendan'. This was only a technical non-compliance and can be condoned under O 1A of the RHC (*Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149 (FC)).

[22] The plaintiff's reliance on O 1A of the RHC to cure this defect is misplaced. The plaintiff is obliged to plead all facts which she intends to rely on, otherwise she cannot strictly give any evidence of them at the trial. On the one hand, it is pleaded that Lim is the defendant's agent and that Lim received the deposit and paid it over to the defendant. On the other hand, Lim testified that he is the plaintiff's agent. This contradicts the pleaded case. The issue of whether Lim or KFC was the agent of the plaintiff or the defendant are relevant issues of fact. Further, there is no mention of KFC or the fact that KFC is the defendant's agent anywhere in the amended statement of claim. In the circumstances, it is manifestly clear that Lim's evidence departs fundamentally from the plaintiff's pleaded case. The question must be answered in the negative. Consequently, Lim's evidence cannot be considered for being in violation of this fundamental principle.

Burden of proof

[23] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case. If the plaintiff fails to do so, it will not do for the plaintiff to say that the defendant has not established its defence (*Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA); s 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the

whole case. Even if the plaintiff established a prima facie case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of the plaintiffs had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (*Abrath v The North Eastern Railway Company* (1883) 11 QBD 79 (CA)).

[24] In this case Lim's evidence has been discounted for the reasons abovementioned. Consequently, there is essentially no other evidence to support the plaintiff's case. The plaintiff has failed to make out a prima facie case. Therefore, the court finds that the plaintiff has clearly failed to satisfy the original burden of introducing evidence to prove her case on the balance of probabilities. In consequence, it is not necessary for the court to consider the question of whether the defendant has established her defence.

[25] For the foregoing reasons, the plaintiff's claim is dismissed with costs of RM12,000.

Claim dismissed with costs.

Reported by Afiq Mohamad Noor